Supreme Court, U.S.
FILED

No. 09-828

JAN 11 2010

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In The

SUPREME COURT OF THE UNITED STATES

IVAN KUHAR,

Petitioner,

v.

MARC GLASSMAN, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio

PETITION FOR A WRIT OF CERTIORARI

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January 11, 2010

QUESTION PRESENTED

The Seventh Amendment to the United States Constitution guarantees that American citizens are entitled to a jury trial in civil actions at common law. The question presented is:

> Does the Seventh Amendment prohibit the dismissal of Petitioner's case in his personal injury action against a liable retail store?

RULE 29.6 STATEMENT

Petitioner Ivan Kuhar is an individual person not subject to Rule 29.6.

Marc Glassman, Inc. is an Ohio corporation headquartered in Middleburg Heights, Ohio.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of certiorari to review the judgment and opinion of the Ohio Supreme Court decided on October 14, 2009 and the underlying decision of the Ohio Eighth District Court of appeals decided on May 21, 2009.

OPINIONS BELOW

The Ohio Supreme Court did not issue an opinion but declined jurisdiction on October 14, 2009 in the Case No. 2009-1281. The opinion debated herein is that which was issued by the Eighth District Court of Appeals on May 21, 2009. This was an unreported decision in Case No. 09-91989, Journal Entry and opinion number 91989, and is reproduced in the Appendix to this Petition. (App. B). The trial court's decision is not reported but is also reproduced in the Appendix to this Petition. (App. C).

JURISDICTION

The judgment of the Court of Common Pleas, Cuyahoga County, Ohio was entered on July 23, 2008. The Appellate Court of Ohio, Eighth District, entered a final judgment on May 21, 2009. The Ohio Supreme Court entered a final judgment on October 14, 2009. This court has jurisdiction under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment of the United States Constitution states:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

U.S. Constitution, Amendment VII.

Ohio Rule of Civil Procedure Number 12(B)(6) states:

(B) How presented: Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 or Rule 19.1"

STATEMENT OF THE CASE

This case presents an important issue regarding a citizen's right to his day in court. If the state of Ohio can deny Ivan Kuhar his chance to put his case before a jury, by abusing the Dismissal procedure, then our constitutional right to a jury trial means nothing.

This is a case of negligence on the part of Defendant Marc's Drug Stores aka Marc Glassman based on injuries to the Plaintiff sustained when he was arrested for shoplifting at a Marc's Drug Store on June 5, 2006.

Plaintiff alleged that Marc's behaved in a negligent fashion, causing injury.

Defendant filed a Motion to Dismiss on July 1, 2008 under Rule 12(B)(6).

Counsel for Plaintiff wrongly believed that he had thirty days to respond to the Motion to Dismiss (assuming wrongly the 12(B)(6) motion was under the thirty day response time limit like a Summary

Judgment Motion). On July 23, 2008, the Court, not having received Plaintiff's response, ruled the Defendant's 12(B)(6) motion as unopposed and granted Judgment **With Prejudice.** The case law says that such a ruling must be without prejudice, allowing Plaintiff to file his action properly.

The Court of Appeals of Cuyahoga County overruled Plaintiff's Appeal and the Plaintiff now appeals to the Ohio Supreme Court for jurisdiction.

REASONS FOR GRANTING THE WRIT

It is a long-held principle of Ohio law that generally speaking, cases should be heard on their merits and not disposed of in a final fashion based on procedure alone. *Quonset Hut, Inc., v. Ford Motor Company*, 80 Ohio St. 3d 46 (1997).

It is "a basic tenant of Ohio Jurisprudence that cases should be decided on their merit." *Perotti v. Ferguson*, 7 Ohio St. 3d 1 (1983).

The Court of The Ohio Eleventh District states it clearly in the following excerpt:

> Indeed, the Ohio Supreme Court has stated that " '[j]udicial discretion must be carefully-and cautiously-exercised before this court will uphold an outright dismissal of a case on purely procedural grounds.' "Quonset, 80 Ohio St. 3d at 48, 684 N.E. 2d 319, quoting *DeHart v. Aetna Life Ins. Co.*, (1982), 69 Ohio St. 2d, 189, 192, 23 O.O. 3d 210, 431 N.E. 2d 644 "In the context of dismissing a case, Ohio courts have held that '[a]n abuse of discretion will be found

where the trial court has not considered other less drastic alternatives.' "*Nozik v. Dalheim* (1998), 11th Dist. No. 96-L-205, 1998 WL 156785, *2, quoting *Ina v. George Fraam & Sons, Inc.* (1993), 85 Oho App. 3d 229, 231, 619, N.E. 2d 501. " 'The law favors deciding cases on their merits unless the conduct of a party is so negligent, irresponsible, contumacious, or dilatory as to provide substantial grounds for a dismissal with prejudice for a failure to prosecute or obey a court order.' "*Nozik at* 5-6, quoting *Schreiner v. Karson* (1997) 52 Ohio App. 2d 219, 222-223, 6 O.O.3d 237, 369 N.E. 2d 800.

The Supreme Court of Ohio has consistently waived a red flag of caution to lower courts exhorting them to dismiss cases with prejudice absent a hearing on the merits only upon extreme circumstances. *Sazima* v. Chalko, 86 Ohio St. 3d 151 (1999) (actions "hardly rise to the level of extreme circumstances that would justify a dismissal with prejudice").

This is especially true when as here, the original motion was a 12(B)(6) Motion for Failure to State a Claim. This concept is seen in *Gallagher v. Borden*, 84 Ohio App. 3d 185, where the plaintiff failed to properly allege fraud (1992) (Ohio Tenth Appellate District – Franklin County):

"However, in journalizing its dismissal of the fraud claim, the trial court dismissed the claim with prejudice. To that extent, the trial court erred. A dismissal for failure to state a claim is not a dismissal with prejudice, but a dismissal without prejudice. Hence, to that limited extent, the third assignment of error is sustained, and this matter is remanded under the third assignment of error to allow the trial court to dismiss the fraud claims without prejudice." [Emphasis Supplied]

We, as Plaintiff's counsel, should have known that the 12(B)(6) motion should have been responded to within seven days as is the correct rule. However, clearly the law requires a dismissal Without Prejudice so that a refiling by the Plaintiff can proceed if he so chooses.

The Supreme Court of Ohio summarizes our plea to this Honorable panel: "Fairness and justice are best served when a court disposes of a case on the merits. Only a flagrant, substantial disregard for the court rules can justify a dismissal on procedural grounds.

Local rules, at any level of our State court system, should not be used as a judicial mine field, with disaster lurking at every step along the way. *Dehart v. Aetna Life,* 69 Ohio St.2d 189 (1982).

The Seventh Amendment to the U.S. Constitution clearly gives every citizen the right to put claims before a jury of his or her peers. The improper dismissal of Mr. Kuhar's claim by the trial court clearly violates this right. We urge this Court to review the Cuyahoga County's Eighth Appellate District decision of June 1, 2009, and to grant Certiorari jurisdiction of this case.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. Petitioner requests that this Court accept Certiorari in this case so that the important issues presented will be reviewed on their merits.

Respectfully submitted,

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APPENDIX A

October 14, 2009 Supreme Court of Ohio Denial of Cert

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

APPENDIX B

SEAN C. GALLAGHER, P.J.:

Appellant, Ivan Kuhar, appeals the trial court's dismissal of his action against Marc Glassman, Inc. ("Marc's"), with prejudice pursuant to Civil Rule 12(B)(6). Kuhar asserts the dismissal should have been without prejudice, allowing him the opportunity to refile the action. For the reasons outlined below, we affirm the trial court's dismissal of the action with prejudice.

One June 5, 2006, Kuhar was apprehended by Marc's store personnel after shoplifting at the Marc's store in Euclid, Ohio. In his single-count complaint filed on June 5, 2009, Kuhar alleged that he was "physically attacked and abused by agents or employees of Marc's in connection with a shoplifting matter, said behavior being unreasonable and negligent in fashion." In effect, Kuhar raised a claim of assault and battery against Marc's.

Marc's filed a motion to dismiss on July 1, 2008, on the basis that the one-year statute of limitations for assault and battery actions had lapsed before the filing of the claim. Kuhar failed to respond to this motion, and the trial court dismissed the action with prejudice pursuant to Civ. R. 12(B)(6) on July 23, 2008. Kuhar now appeals, raising one assigned error.

"Appellant contents the Trial Court committed error in dismissing Plaintiff's case *With Prejudice* after Plaintiff missed the Court's filing deadline in response to a 12(B)(6) Motion to Dismiss. It should have been dismissed *Without Prejudice* which would have allowed a refilling of this action."

In his assigned error, Kuhar contends the trial court should have dismissed the action with prejudice, allowing him to refile the action. He asserts his failure to respond to motion to dismiss filed by Marc's should not result in a dismissal with prejudice.

Marc's argues that the complaint was properly dismissed with prejudice because the statute of limitations had run.

An appellate court reviews a Civ.R. 12(B)(6) motion to dismiss de novo. *Hughes v. Miller*, Cuyahoga App. No. 91482, 2009-Ohio-963. A motion to dismiss for failure to statue claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. Id. Under the de novo analysis, an appellate court must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party. Id.

When the essential character of the alleged tort is an intentional, offensive touching, the statute of limitations for assault and battery applies, even if the touching is pled as an act of negligence. *Salen v. Marc Glassman, Inc.,* Cuyahoga App. No. 86010, 2005-Ohio-6127, citing *Love v. Port Clinton (*1988), 37 Ohio St.3d 98. To hold otherwise would defeat the assault and battery

statute of limitations, because nearly all assault and battery claims can be pled as negligence claims. Id. One cannot circumvent the statute of limitations for assault and battery through clever pleading or by utilizing another theory of law.

Even accepting Kuhar's claims alleged in the complaint as true, it is inescapable that the cause of action raised in Kuhar's complaint is assault and battery. The statute of limitations for an intentional tort, such as assault and batter, is one year. R.C. 2305.111. *Walker v. Bunch*, 7th Dist. No. 05-MA-144, 2006-Ohio-4680. While Kuhar references the term "negligence" in the complaint, the factual allegations are the Kuhar was "physically attached and abused." There was no separate claim of negligence raised regarding the hiring, supervision, or retention of the Marc's workers.

A Civ.R. 12(B)(6) motion for failure to state a claim based on an expired statute of limitations may be granted when the

complaint shows on its face the bar of the statute. *Mackey v. Luskin,* Cuyahoga App. No. 88874, 2007-Ohio-5844. Here, the complaint alleged that the incident happened on June 5, 2006. The complaint was filed on June 5, 2008, one year after the statute of limitations expired.

Further, a dismissal for failure to commence an action within the applicable statute of limitations is a dismissal on the merits of the case; therefore, a dismissal with prejudice is appropriate. *Lewis v. Hayes,* Franklin App. No. 08AP-574, 2009-Ohio-640; citing *LaBarbera v. Batsch*, (1967), 10 Ohio St.2d 106.

Here, it would have made little difference if the trial court dismissed the action without prejudice. Even a refiling would have been subjected to the same review under the one-year statute of limitations. Kuhar's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellate recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

APPENDIX C

July 23, 2008 Trial Court Opinion (CUY.CO.OH)

Defendant Marc Glassman Inc.'s Motion to Dismiss, Filed 07/01/2008, is unopposed and granted. Plaintiff's case is hereby dismissed with prejudice pursuant to Civil Rule 12(B)(6) for failure to state a claim upon which relief can be granted. Final. Court Cost Assessed to the Plaintiff.